## IV. APPLICATION OF THESE PROPOSALS

Commenters generally observe that the CMRS providers addressed in the NPRM include all providers of two-way interconnected services.[34] However, the commenters also include claims of paging providers seeking Commission-directed compensation for terminating LEC calls on their networks.[35] The weakness in these claims is obvious. That is, the calls of LEC customers to paging services are generally not terminated by paging companies; they are terminated by the LEC at the paging company.[36] Then a second, separate "call" is generated by the paging company on its proprietary, non-interconnected system to its subscribers. The private paging "network" is no more a part of the public "network of networks" than is a telephone answering service. The LEC customer does not communicate with the "paging" customer. Indeed, the paging customer must use another "interconnected" network to create such communication link.

"Paging technology" may be changing towards a truly interconnected system, but LEC terminating charges are proper so long as LECs provide call-terminating service to

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[34] APC at 17

[35] See, e.g., Comments of Celpage 4-6; Comments of Paging Network 24-29.

[36] Technology is unquestionally changing in the "paging" industry. As it moves to real-time, interconnected two-way communications the Commission will have to consider further the appropriate applications of its access charge principles.

the paging provider, irrespective of what that provider does thereafter to contact its customers.

## V. CONCLUSION

As discussed above, it is imperative that the Commission focus its limited resources on the expeditious conclusion of the Congressionally-mandated Interconnection and Universal Service proceedings. At the same time, it should immediately act to review interstate access charges on a comprehensive basis in the Access Charge Reform proceeding in order to provide the necessary foundation for nationwide inter-carrier competition on a fair and economic basis.

Conversely, there has been no necessity shown for federally-mandated LEC-CMRS interconnection charges. Current wireless services are expanding at an enormous rate of growth and future wireless service opportunities are attracting a near-unbelievable amount of investment. Further, it is clear that the imposition of required "bill-and-keep" arrangements would be uneconomic, even on an "interim basis," sending the wrong pricing signals to CMRS providers considering network design and investment while requiring LECs and their customers to pay the costs. Finally, there are now Congressionally set principles and procedures in the 1996 Act for the rapid establishment of new CMRS-LEC interconnection agreements under State regulatory administration, with the federal judiciary empowered to enforce adherence to law. These agreements will meet the concerns expressed in the NPRM. Good public policy, new statutory direction, and the efficient use of public and private resources all require that the NPRM be terminated.

Respectfully submitted,

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95-185.REP

ATTACHMENT A

**NYNEX LEGAL ANALYSIS**
**OF FCC JURISDICTION TO ESTABLISH**
**INTRASTATE LEC-CMRS INTERCONNECTION RATES**
**March 25, 1996**

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## I. Introduction

### A. Overview

This paper examines whether the Federal Communications Commission ("FCC" or "Commission") possesses the statutory authority to regulate the intrastate rates charged by local exchange carriers ("LEC") to commercial mobile radio service ("CMRS") providers for interconnection and, specifically, whether it can mandate "bill and keep" for such services. We have reviewed the pertinent provisions and legislative history of the Communications Act of 1934, as amended in 1993 and 1996, (codified or to be codified at 47 U.S.C. Section 151 et seq.). We also reviewed the information relied upon and proposed findings contained in the Commission's Notice of Proposed Rulemaking in CC Docket Nos. 95-185 and 94-54 and the comments filed on (or about) March 4, 1996 in that proceeding.[1/]

Based on our review of these materials, we believe that the Commission does not have the authority to preempt state regulation of LEC intrastate interconnection rates to CMRS providers and, therefore, is without authority to prescribe a bill and keep ratemaking system for such services.

The starting point for analyzing the Commission's jurisdiction must be the statutory language. See, e.g., Blum v. Stenson, 465 U.S. 886, 896 (1984). The analysis must give meaning to all portions of the statute. See Louisiana Public Service Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 370 (1986) ["Louisiana PSC"] ("provisions of a statute should be read so as not to create a conflict"). As discussed below, the Communications Act, as amended, provides no basis for federal preemption of State commission regulation of LEC rates to CMRS providers for intrastate service. Commentators that claim Section 332 provides the Commission sole and plenary jurisdiction over any cost that affects rates charged by CMRS providers neglect both the specific language of Section 332 and the importance of

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1/ To avoid repetition, comments filed on or about March 4, 1996 in this docket are cited only with reference to the party and page number.

Section 152(b) of the Communications Act of 1934. Contrary to the claims of some commentators, the recently enacted Telecommunications Act of 1996 ("1996 Act"), which places into effect a regulatory structure specifically applicable to LEC interconnection rates, confirms and reinforces the existing allocation of regulatory authority over LECs' interconnection rates for CMRS providers, consistent with 47 U.S.C. Section 152(b) and 47 U.S.C. Section 332.

The Supreme Court has identified six categories in which preemption is deemed permissible: (1) Congress expresses a clear intent to preempt state law (citing Jones v. Rath Packing Co., 430 U.S. 519 (1977)); (2) there is an outright or actual conflict between federal and state law (citing, e.g., Free v. Bland, 369 U.S. 663 (1962)); (3) compliance with both federal and state law is in effect physically impossible (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)); (4) there is implicit in federal law a barrier to state regulation (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)); (5) Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law (citing Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947)); or (6) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress (citing Hines v. Davidowitz, 312 U.S. 52 (1941)). See Louisiana PSC, 476 U.S. at 368-69. Section II of this memorandum addresses the statutory language of the Communications Act, as amended, and finds no basis in the words of the statute or its legislative history to support a claim that Congress has "expressly manifested a clear intent to displace state law." Id. at 369. Section III addresses the remaining elements of preemption, with the discussion tracking the analysis of preemption issues employed by the United States Court of Appeals for the District of Columbia Circuit in Public Serv. Comm'n of Maryland v. Federal Communications Comm'n, 909 F.2d 1510, 1515 (D.C. Cir. 1990) ["PSC of Maryland"].

### B. The Notice of Proposed Rulemaking

In the Notice of Proposed Rulemaking ("NPRM") in CC Docket Nos. 95-185 and 94-54, the Commission requests comments on the appropriate role of the FCC in implementing interconnection policies between LECs and CMRS providers to further the Commission's goal of promoting the development of CMRS. NPRM ¶ 107. The Commission suggests three possible regulatory models (which would involve varying levels of federal intervention) through which it could act to assure that federal goals regarding promotion of "an economically vibrant and competitive nationwide market for commercial mobile radio services" are met. NPRM ¶¶ 96, 108-110. This paper addresses claims that the Commission can determine rates for intrastate interconnection rates charged by LECs to CMRS providers. NYNEX has separately filed detailed comments which address the full panoply of issues posed by the NPRM and responds to other commentators.

## II. The Statutory Language of the Communications Act of 1934, as Amended, Authorizes States to Regulate Intrastate LEC Interconnection Rates

The Commission has a specific grant of jurisdiction over *interstate* communications by wire or radio (and transmission of energy by radio) and persons engaging in such, and the power to set rates for such persons as constitute common carriers subject to the Commission's jurisdiction. 47 U.S.C. Sections 152(a) and 205. This explicit grant of jurisdiction provides authority for the Commission to direct specific LEC interconnection rates as applicable to interstate traffic. However, the Commission's authority under Sections 152(a) and 205 is limited by the specific reservation to the states of the power to establish charges for *intrastate* communications by wire or radio, which is set forth in 47 U.S.C. Section 152(b), and to determine pricing, arbitrate and approve agreements for LEC interconnection agreements under 47 U.S.C. Section 252. Louisiana PSC, supra.

### A. Section 332 does not confer jurisdiction on the Commission to regulate intrastate LEC interconnection rates.

Several participants in the NPRM have suggested that 47 U.S.C. Section 332, as amended by the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"), provides the Commission a specific grant of jurisdiction over rates that affect service to CMRS providers, and thus jurisdiction to implement intrastate LEC interconnection rates. See, e.g., NPRM ¶¶ 99-104. However, no participant points to any specific provision of the Communications Act, as amended by the 1993 Budget Act, which expressly confers this authority on the Commission. Instead, proponents of federal preemption rely almost exclusively on statements in the legislative history of the 1993 Budget Act which express a congressional intent to overcome regulatory barriers that "could impede the continued growth and development of" CMRS,[2/] coupled with a variety of "logical corollaries" and inferences ostensibly derived from the statutory language itself.

To be sure, Congress sought to promote the growth of a viable CMRS industry in the 1993 Budget Act. But this general statement of purpose can not endow the Commission with powers not conferred on the Commission in the statute itself nor allow the Commission to disregard the long-standing policy embedded in numerous provisions of the Act which establish a dual system of federal and state regulation of LECs.

The 1993 Budget Act merely:

1) requires the FCC to direct common carriers to establish "physical connections" with CMRS providers, 47 U.S.C. Section 332(c)(1)(B);

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[2/] See H.R. Rep. No. 111, 103rd Cong. 1st Sess. 260 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587.

2) provides that states may not regulate entry of CMRS providers, 47 U.S.C. Section 332(c)(3)(A); and

3) preempts state regulation over rates charged *by* CMRS providers, 47 U.S.C. Section 332(c)(3)(A).

There is no grant of jurisdiction to the Commission to regulate the rates charged by an LEC *to* a CMRS provider. In fact, regulation of *LEC* rates is not even mentioned in Section 332.[3]

A number of commentators have argued that Section 332 gives the Commission "plenary jurisdiction" over CMRS providers.[4] Their arguments cannot be supported by the words of the statute because Section 332 preempts on a specific and limited basis state jurisdiction over entry of and rates charged by CMRS providers. Even if true, which is not the case, this would not serve as a basis for FCC regulation of interstate LEC-CMRS interconnection rates which is what the commentators seek.[5] Provisions that apply exclusively

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[3] Certain CMRS providers claim that the second sentence of Section 332(c)(1)(B) grants additional authority to the Commission which supports Commission jurisdiction over LEC rates. See *ex parte* letter from Werner K. Hartenberger, Counsel for Cox Enterprises to William F. Caton, Secretary, Federal Communications Commission, filed in CC Docket No. 95-185 on February 28, 1996 and attached memorandum at page 3. ("Cox Memo"). The second sentence merely states that

> "[E]xcept to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act."

The "request" referenced in this sentence is a request pursuant to the immediately preceding sentence of Section 332(c)(1)(B) by a CMRS provider for <u>physical</u> interconnection. Plainly the second section only deals with physical interconnection and not with LEC rates. Indeed, this subsection makes no reference to rates of any kind.

[4] <u>See</u> <u>e.g.</u>, Joint Initial Comments of Sprint Spectrum and American Personal Communications at 36; Comments of Nextel Communications, Inc. at 15-16; Comments of AT&T Corp. at 19; Comments of Century Cellunet, Inc. at 13; Telecommunications Industry Association Ex Parte Presentation, CC Docket No. 95-185 (March 1, 1996) at 1 ["CTIA Ex Parte Communication"].

[5] Several commentators contend that preemption would be justified *if* or *to the extent* that State commission regulation barred entry of CMRS providers. <u>See</u>, <u>e.g.</u>, Comments of Time Warner Communications Holdings, Inc. at 24; CTIA Ex Parte Communication at 3.
(continued...)

to rates charged by CMRS providers can not be extended to apply to LEC rates, particularly in light of the important reservations of power to state regulators contained in Sections 152(b), 332 and 252.

Except as specifically provided in Section 332, which applies solely to rates charged by CMRS providers, the states' authority to regulate intrastate rates, historically provided by the Communications Act of 1934, was not contracted by the 1993 Budget Act. Pursuant to Section 152(b), the states were granted broad authority to regulate intrastate service, which includes intrastate service offered by LECs. Prior to enactment of Section 332, the Commission's jurisdiction to direct interconnections was limited to authority over common carriers engaged in interstate or foreign communications by wire or radio. 47 U.S.C. Section 201. Section 332 provides that upon request the Commission shall direct a common carrier to interconnect with a CMRS provider, but, as one State commission cogently stated, except as required to respond to such a request, "the Commission's authority with respect to interconnection of CMRS providers is no greater than it would be under Section 201. Therefore, pursuant to 47 U.S.C. Section 152(b), the Commission may not preempt the state from regulating intrastate rates with respect to interconnection." Comments of the New York State Department of Public Service, at 14.

Indeed, the commentators that urge that the Commission has authority under Section 332 to regulate rates charged by LECs to CMRS providers largely ignore that Section 152(b) continues to reserve to State commissions authority over intrastate rates. Those commentators that address Section 152(b) propound arguments that defy the statutory language. In particular, the Cellular Telecommunications Industry Association ("CTIA") and AT&T Corp. claim:

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[5](...continued)
As discussed below, preemption under Section 332 could be justified to the extent necessary to negate state regulations that prevent effectuation of the federal goal of insuring that artificial barriers to entry of CMRS providers are removed, but no commentator demonstrated that LEC-CMRS interconnection rates form such a bar to entry and the comments of others demonstrate, to the contrary, that CMRS providers have flourished. See, e.g., CTIA Ex Parte Communication at 1 (citing "rapid expansion" of CMRS industry); NYNEX Comments at 11-13 (growth of CMRS providers is "astonishing"). See pages 15 to 16, infra.

> The 1993 Budget Act amended section 2(b) to remove the bar on Federal regulation of 'charges . . . in connection with intrastate communication service . . . by radio.' Thus, it is not the case that the FCC's authority over CMRS rates is limited to end user charges.[6]

Although CTIA and AT&T fail to note the source of their quote, it is from the portion of Section 152(b) that was *not* amended by the 1993 Budget Act. This turns the meaning of Section 152(b) and Section 332 upside down. Prior to the 1993 amendment, Section 2(b) granted to State commissions jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service . . . by radio." The 1993 Budget Act created an exception *with respect to the specific duties that were delegated exclusively to the Commission by Section 332*; as amended, Section 2(b) delegates to the states the same powers over intrastate communications by radio that they had previous to the 1993 Budget Act "[e]xcept as provided in . . . section 332." 47 U.S.C. Section 152(b). Since Section 332 only preempts state regulation of rates charged *by* CMRS providers and of entry and authorizes the Commission to order physical interconnection, other charges made "*in connection with* intrastate communications service . . . by radio" remain vested in the State commissions. Thus, to the extent that LEC interconnection rates may be deemed to be "in connection with intrastate communications service . . . by radio," State commissions retain jurisdiction.

**B. Sections 251 and 252 confirm state authority over intrastate LEC interconnections rates.**

There is no conflict between the provisions of Section 332 and the newly enacted Sections 251 and 252.[7] Of note, the term "telecommunications carrier" is defined in the 1996 Act as any provider of telecommunications services except aggregators of telecommunications services. 47 U.S.C. Section 153.[8] In comparison, the term "local exchange carrier" is defined to exclude CMRS providers (unless the Commission finds such service should be included in the definition of LEC). 47 U.S.C. Section 153. Thus, a LEC's duty to interconnect with CMRS providers and the rates for such interconnection are governed by newly enacted Sections 251 and

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[6] CTIA Ex Parte Communication at 2; Comments of AT&T Corp. at 22.

[7] To the extent that the Commission had concerns that its policy of mutual compensation was not "enough" to encourage development of CMRS, NPRM ¶¶ 1, 2, its concerns are directly addressed by the 1996 Act which identifies appropriate pricing standards and requires their implementation as a matter of federal law.

[8] Because Section 3(c) of the 1996 Act requires reorganization and renumbering of 47 U.S.C. Section 153, specific subsection designations are not included here. The definitions of "telecommunications carrier," "telecommunications service" and "local exchange carrier" to be added to Section 153 and referenced herein are set forth in Section 3(a)(2) of the 1996 Act.

252. However, a CMRS provider is not considered an LEC, and thus the delegation of rate authority to State commissions for LEC interconnection rates made pursuant to Section 252 does not conflict with the FCC's jurisdiction over the rates of CMRS providers set forth in Section 332. In other words, when all portions of the statute are given effect, Section 252 provides that State commissions have jurisdiction over the rates of LEC providers (such jurisdiction to be exercised consistent with the standards established in Section 251 as implemented through regulations to be promulgated by the FCC) and Section 332 preempts state rate regulation in certain respects as to CMRS providers. Thus, the delegations of jurisdiction in the 1996 Act and Section 332 are harmonious.

The 1996 Act establishes as a matter of federal law certain duties owed by LECs with respect to interconnection. In particular, it establishes the duty of incumbent LECs to interconnect with "any requesting telecommunications carrier [which is defined to include CMRS providers] . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with terms and conditions of the agreement and the requirements of this section and section 252." 47 U.S.C. Section 251(c)(2)(D). It also requires all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. Section 251(b)(5).[9]

Importantly, determination of specific rates for LEC interconnections is delegated to State commissions. Section 252 grants jurisdiction to the State commissions to approve negotiated agreements for LEC interconnection service or to establish such agreements through arbitration. 47 U.S.C. Section 252(b), (e)(1). In arbitrating agreements or approving arbitrated agreements, the State commission is required to insure compliance with the standards set forth in Section 251, including Sections 251(b)(5) and (c)(2) as applicable, and regulations prescribed by the Commission pursuant to that section. 47 U.S.C. Sections 252(c)(1) and (e)(2)(B). Subsections 252(d)(1)(A) and (B) set forth the standard which a State commission must apply in determining whether an interconnection rate charged by an incumbent LEC is "just and reasonable" for purposes of Section 251(c)(2) and generally requires that rates be based on costs including a reasonable profit. Section 252(d)(2)(A) sets forth the standard which a State commission must apply in determining whether any LEC has complied with the reciprocal compensation arrangements for transport and termination in Section 251(b)(5);[10] specifically:

> a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless --

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[9] The Commission must implement federally mandated LEC requirements in Section 251 by regulation. 47 U.S.C. Section 251(d)(1).

[10] Section 252(d)(2)(B)(i) permits bill and keep only if the parties voluntarily agree to "waive" mutual recovery. See NYNEX Reply Comments, II.A.2.

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. Section 252(d)(2)(A).

The import of Section 252 is unmistakable. The determination whether a specific rate complies with the general standards of Section 251 is committed to *State commissions*.[11]

In addition, an incumbent LEC may enter into a voluntarily negotiated agreement "without regard to the standards set forth in subsections (b) and (c) of section 251," subject to a finding by the *State commission* that the rates are non-discriminatory and in the public interest. 47 U.S.C. Section 252(a)(1) (emphasis added). Moreover, Section 251(d) "states that nothing precludes the enforcement of State regulations that are consistent with the requirements of new section 251." S. Conf. Rep. No. 230, 104th Cong. 2d Sess. (1996) (Joint Explanatory Statement).[12] Thus, the FCC maintains an important role, indeed must establish a framework against which negotiations and state action will occur, but the 1996 Act makes it clear that State commissions are to resolve rate and other issues concerning, inter alia, LEC transportation and termination of CMRS calls, in the first instance.

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[11] The Commission has authority to act in lieu of a State commission only "[i]f a State commission fails to act to carry out its responsibility." 47 U.S.C. Section 252(e)(5).

[12] CTIA claims that Section 251(d)(3) empowers the Commission to "preclude" state regulation that is inconsistent with Section 251. CTIA Ex Parte Communication at 4. Other CMRS providers claim that Section 251(d)(3), which prevents the FCC from preempting state regulation that "establishes access and interconnection obligations" of LECs under certain circumstances, allows the Commission to preempt by "logical corollary" any regulation that, inter alia, does not involve access or interconnection obligations. They further claim that it removes the requirement applied in numerous preemption cases that it must be impossible to sever interstate and intrastate service. See, e.g., Cox Memo at 7. Section 251(d)(3) says that the Commission shall *not* preclude the enforcement of any regulation, order, or policy of a State commission that, inter alia, is consistent with Section 251. Section 251(d)(3) by it terms is a straightforward limitation on Commission authority to preempt. It creates a "safe haven" for state regulation. It has no bearing on state regulation that does not establish access and interconnection obligations of LECs. States actions outside the scope of Section 251(d)(3) must be evaluated under normal rules of statutory construction and traditional concepts of preemption law. See, e.g., Louisiana PSC, 476 U.S. at 368-69.

Section 253, also newly enacted as part of the 1996 Act, expands the Commission's authority over *entry* into the telecommunications market by barring states from erecting barriers to entry of *any* utility, not just CMRS carriers. Section 253(b) preserves State commission authority "to impose, on a competitively neutral basis and consistent with section 254 [pertaining to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus, federal jurisdiction over regulation of entry is expanded but the jurisdiction of states over intrastate ratemaking and terms and conditions of service necessary to address local concerns are preserved. The legislative history clarifies that Section 253(b) preserves the ability of states to "safeguard the rights of consumers," but confirms: "explicit prohibitions on entry by a utility into telecommunications are preempted under this section."[13/] Thus, the Commission's authority over *entry* into the telecommunications field, to the exclusion of states, is firmly and clearly established, but Section 253 does not in any way limit the jurisdiction over LECs' interconnection *rates* that was granted to states in Section 252.

Contrary to the claims of some commentators, (Comments of the Personal Communications Industry Association at 26; Joint Initial Comments of Sprint Spectrum and American Personal Communications at 40 & n.58) the "savings clause" found in Section 253(e), which provides that "[n]othing in this section shall affect the application of Section 332(c)(3) to commercial mobile service providers," does not alter this conclusion. 47 U.S.C. Section 253(e). It merely preserves the statutory status quo before enactment of the 1996 Act. Importantly, Section 253(e) refers to FCC jurisdiction only over *CMRS* providers, which confirms the narrow scope of Section 332. Section 253(e) makes no reference to LECs or their rates. The language of Section 253 is consistent with the view that Congress believed that Section 332 limited state rate authority over CMRS providers, not LECs.[14/]

Several commentators offer radical and erroneous interpretations of the 1996 Act that defy the actual language of the statute. Century Cellunet, Inc. claims that "[t]aken together, Sections 251 and 252 empower the Commission to promulgate preemptive rules that ensure that co-carriers are fairly compensated for interconnected services." Comments of Century Cellunet, Inc. at 11. However, Section 252's specific delegation to State commissions of authority to

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[13/] Section Section 253(d) provides that "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) , the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

[14/] Similarly, the savings clause in Section 251(i) preserves the Commission's authority under Section 201, which, likewise, does not confer jurisdiction in the Commission over LEC-intrastate rates.

review and approve negotiated and arbitrated agreements and/or establish agreements through arbitration cannot be "preempted"; there is no specific grant of jurisdiction to the FCC to establish rates, only a general mandate to promulgate rules to implement certain standards set forth in the statute. Indeed, the Commission is directed to promulgate regulations to implement only Section 251, *not* Section 252. See 47 U.S.C. Section 251(d). Century Cellunet further argues that because "these sections . . . explicitly reference bill and keep . . . if the FCC deems bill and keep to be the best proxy for 'just, reasonable and nondiscriminatory' compensation for interconnected services, it is empowered to mandate bill and keep." Id. However, the only reference to "bill and keep" is in Section 252(d)(2)(B) and it is mentioned as a rule of construction with respect to the authority of *State commissions*, not the FCC.

AT&T Corp. and CTIA assert that the pricing standards of Section 252(d) are the FCC's responsibility to implement because "[t]o conclude otherwise would empower the States to adopt pricing standards that are inconsistent with or that frustrate the goals of section 251." CTIA Ex Parte Communication, at 4 n.14. See also Comments of AT&T Corp. at 29 n.80. Such assertions blatantly ignore the statutory language. The first five words of Section 252(d)(1) (after the headings) are "Determinations by a State commission . . ."; Sections 252(d)(2) and (d)(3) each provide direction to "a State commission." In contrast, there is absolutely no reference that suggests that the Commission has any authority to make pricing determinations under Section 252. As to AT&T's and CTIA's bizarre allegation that the FCC must act to avoid the possibility that a state might adopt a standard that is inconsistent with Section 251, Section 252(e)(6) provides that a State commission determination under Section 252 is subject to review in the appropriate Federal district court "to determine whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. Section 252(e)(6). Thus, there is adequate protection in the federal courts against State "error" in making a pricing determination.

### C. Preemption cannot be based on concerns that the current system is unworkable.

Finally, several commentators suggested that State commission jurisdiction over LEC rates must be preempted by Section 332 because "[s]plitting regulatory jurisdiction so that the FCC regulates CMRS rates and the states regulate LEC rates for the same interconnection creates an unworkable process." Comments of Omnipoint Corporation at 14 n.9; Joint Initial Comments of Sprint Spectrum and American Personal Communications at 40 ("same transaction would be regulated by two different entities -- a situation that would lead to regulatory whip-saw"). There are two responses. First, Omnipoint's allegation that the process is "unworkable" and Sprint Spectrum's and APC's suggestion of regulatory whip-saw are completely unsupported. Indeed, under the current regulatory scheme, States govern LEC interconnection rates and the FCC governs CMRS providers' rates, yet the CMRS industry is growing exponentially. There is simply no basis to believe that a "split" in jurisdiction creates a problem. Second, even if there is a "split," given that the 1996 Act allocates jurisdiction over LEC interconnection rates between federal and state authorities and Section 332 commits jurisdiction over CMRS providers' rates to the Commission (in the first instance, unless and until a State successfully petitions to receive such jurisdiction), the "split" is mandated by statute. Louisiana PSC, 476 U.S. at 375-76 (requiring that statutory dual jurisdiction scheme be given effect).[15]

### D. Conclusion

Proponents of preemption wholly ignore, or at most give lip service to, one of the most venerable policies embedded in the Communications Act. Congress has long mandated a program of dual federal and state regulation. A general policy favoring CMRS development cannot provide the authority to preempt state authority over matters traditionally within state purview. The statutory language of Section 332 simply does not support a claim that it is a basis for Commission jurisdiction over LEC interconnection rates as claimed by some commentators. Indeed, the 1996 Act reinforces and confirms state authority over such rates.

Based on the plain language of the statute, even as amended in 1993 and confirmed in 1996, the Commission does not have jurisdiction over LEC interconnection rates for terminating intrastate traffic and there is no clear intent in the statute to preempt state regulation of intrastate LEC interconnection rates; on the contrary, there is an explicit grant of jurisdiction to the State commissions, which must be respected.

## III. The Success of Current Policies Precludes The Commission From Preempting State Regulation of LEC-CMRS Intrastate Interconnection Rates

### A. Standard For Preemption

As explained by the United States Court of Appeals for the District of Columbia Circuit in the context of another claim of preemption under the Communications Act, preemption applies only if, "(1) the matter to be regulated has both interstate and intrastate aspects [cite omitted]; (2) FCC preemption is necessary to protect a valid federal regulatory objective [cite omitted]; and (3) state regulation would 'negate[] the exercise by the FCC of its own lawful

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[15] Several commentators also make the unsupported allegation that uniformity of interconnection rates is necessary or at least desirable. Comments of Time Warner Communications Holdings, Inc. at 29; Comments of AT&T Corp at 19. However, given that Section 332 (with respect to rates charged by CMRS providers) and Section 252 (with respect to rates charged by LECs for interconnection) both allow for state rate regulation, Congress could not have intended to require uniformity; if uniformity were required, Congress would not have allowed for state regulation. Cf. Louisiana PSC, 476 U.S. at 375-76. On the other hand, to the extent that uniformity is deemed desirable, this Commission and the States can seek to achieve this goal through a process of consultation and comity.

authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[16]

### B. PSC of Maryland (1): Whether the matter to be regulated has both interstate and intrastate aspects.[17]

The Commission has previously concluded that "because cellular carriers were primarily engaged in the provision of 'local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal, concern.'"[18] However, such service does to some extent involve interstate traffic. Thus, regulation of LEC-CMRS interconnections does have interstate and intrastate aspects. However, contrary to the claims of CMRS providers, there is no intent in the Communications Act for the FCC to preempt state regulation or to "occupy the field" of LEC-CMRS intrastate rates by "federalizing" CMRS interconnection policy.[19]

The Communications Act reserved jurisdiction over LECs' intrastate rates to the states, Section 152(b), and established a separation process, to facilitate sharing of jurisdiction between state and federal authorities, 47 U.S.C. Section 410. The fact that the Communication Act includes specific reservations of power to the states (1) is prima facie evidence that Congress did not intend for federal jurisdiction to preempt or in any way bar state regulation, within the

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[16] PSC of Maryland based its preemption analysis on Louisiana PSC, but distilled these six potential bases for preemption into the three prong test identified above. We have organized this section of the memorandum to track the three prong PSC of Maryland test, because it is specifically tailored to the primary concerns that arise in analyzing Commission actions under the Communications Act, as amended. However, the PSC of Maryland test was based upon each of the more general factors mentioned in Louisiana PSC, and therefore, each of the Louisiana PSC factors are captured in this analysis or in Section II, supra.

[17] This section covers the fourth and fifth bases for preemption (and, to the extent not already covered in Section II, the first basis) described in Louisiana PSC.

[18] In re Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408, 5453 (1994) (quoting The Need to Promote Competition and Efficient Use of Spectrum Radio Common Carrier Services, 59 Rad. Reg. 2d (P&F) 1275 (1986)) ["Policy Statement"].

[19] Of course, if CMRS interconnection policies, including rates charged *to* CMRS providers, were "federalized," the Commission would have the responsibility to deal with the totality of the rate and other issues posed by its new jurisdiction. At a minimum, it would have to establish rates that recovered the costs currently recovered at the intrastate level through interconnection rates. As noted in footnote 32, this would require an increase in interstate rates of approximately one billion dollars annually.

sphere prescribed for it, and (2) presents a substantial obstacle in any attempt by the FCC to expand its jurisdiction by invoking the preemption doctrine.

As the Supreme Court observed in Louisiana PSC, "Section 152(b) constitutes, as we have explained above, a congressional denial of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. *Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power on itself.*" Louisiana PSC, 476 U.S. at 374 (italicized emphasis added; underscored emphasis in original). A federal preemption right, if it were to exist at all, must surmount the specific *denial* of jurisdiction to the FCC set forth in Section 152(b), *as well as the specific grant of jurisdiction to State commissions over LEC intrastate rates that is set forth in Section 252.*

As discussed above, Section 332 does not provide any basis for expansion of the Commission's jurisdiction to intrastate LEC rates. The authority granted to the Commission under Section 332 is specific to regulation of CMRS providers' rates and entry. In other respects, state rate jurisdiction under Section 152(b) is preserved. Contrary to the claims of some commentators,[20] the mere fact that state rate regulation may affect the rates charged by CMRS providers, by affecting the CMRS providers' costs, cannot serve as a basis for extending FCC jurisdiction beyond the scope authorized by Congress. Section 332 explicitly provides states with jurisdiction as to the non-rate terms and conditions of CMRS. 47 U.S.C. Section 332(c)(3)(A).[21] While rates charged by LECs to CMRS providers may affect a CMRS provider's cost of service, so do labor costs, equipment costs, and other costs for goods and services provided by entities not regulated by the FCC. Indeed, labor and equipment costs may have an impact on CMRS interconnection costs exceeding LEC interconnection costs; yet, no one has suggested that the Commission, for example, attempt to regulate the manufacture of telephone equipment. There is nothing in the language of the Act which provides the Commission with rate jurisdiction over entities that provide goods or services to CMRS providers for interconnection or other reasons. Cf. National Ass'n of Regulatory Util. Comm'rs v. Federal Communications Comm'n, 746 F.2d 1492, 1500 (D.C. Cir. 1984) ["NARUC v. FCC I"] ("Section 152(b) merely confirms that the States retain jurisdiction over purely intrastate calls

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[20] See, e.g., Initial Comments of Vanguard Cellular Systems, Inc. at 24; Comments of Omnipoint Corporation at 13-14.

[21] Terms and conditions will clearly affect the costs of CMRS providers and therefore the rates of CMRS providers, and yet Congress did not find it necessary to place such authority in the federal jurisdiction. See H.R. Rep. No. 111, 103rd Cong. 1st Sess. 261 (1993) reprinted in 1993 U.S.C.C.A.N. 378, 588 (providing a lengthy list of "terms and conditions" and specifying that such list is "illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions'").

notwithstanding the economic effect such State jurisdiction might have on the interstate market").[22/]

### C. PSC of Maryland (2): Whether FCC preemption is required to protect any valid federal interest.[23/]

Proponents of a federally-mandated bill and keep proposal argue that because Congress expressed an intent to promote the growth of CMRS service and entrusted the FCC with comprehensive federal jurisdiction over regulation of entry, the FCC has preemptive authority to set rates for LEC-CMRS interconnections. Various intervenors have urged the Commission that its "current policy *can be* and is being used by LECs to reduce competition." NPRM ¶ 14 (emphasis added). They have identified a number of possible motivations and theories pursuant to which discrimination could occur. NPRM ¶¶ 12-13. It is apparently the force of these arguments, which the Commission reviews under the heading "Need for Reform," which compelled initiation of this proceeding. NPRM Section I.B.2. ("Need for Reform") and ¶¶ 8-14 therein. However, the arguments these intervenors put forth in support of their position rely on supposition and theory, not on reference to actual occurrences, see, e.g., NPRM ¶ 12-13, and are mooted, in any case, by the 1996 Act.

The Commission tentatively concludes more narrowly that it has jurisdiction to preempt state regulation "*to the extent* that such regulation precludes (or effectively precludes) entry of CMRS providers." NPRM ¶ 111, citing 47 U.S.C. Section 332(c)(3) (emphasis added). The Commission reads its authority to preempt as extending to state policies that preclude "reasonable interconnection." NPRM ¶ 111. As the Commission appropriately recognizes, it must utilize its authority to the extent necessary to protect legitimate federal interests, but is constrained to taking only the role necessary to effectuate its interests.

In this case, there is no showing of an outright or actual conflict between state rate regulation of LEC-CMRS interconnections and the federal goal of assuring that artificial barriers to entry of CMRS providers are eliminated.[24/] To the contrary, in the January 11 NPRM, the Commission observed that "[w]e recognize that states share our goals of stimulating economic growth by promoting the development of CMRS, which would upgrade the nation's

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22/ 47 U.S.C. ¶ 332(c)(3)(A)(i)(ii) and (B). The potential shift of jurisdiction over CMRS providers from the federal to the state domain where the CMRS providers assume LEC characteristics illustrates Congress' intent that regulation of LECs' (or their look-a-likes) is primarily a state function.

23/ This section covers, to some extent, the second and sixth bases for preemption described in Louisiana PSC, which are addressed further in Section III.D. below.

24/ See Louisiana PSC, 476 U.S. at 368 (identifying an outright or actual conflict between federal and state law as a basis for preemption, citing Free v. Bland, 369 U.S. 663).

telecommunications infrastructure and would help make available broader access to communications networks." NPRM, ¶ 107. Indeed, the Commission affirmed that "a large number of states have removed many of the legal barriers to competition for local services." NPRM, ¶ 24.

The history of explosive growth in the cellular communications industry -- ten times the rate of growth for LECs -- and the tremendous amount of capital proposed to be invested in personal communications services ("PCS"), even at this early stage of PCS development, is compelling evidence that there are no significant barriers to growth of the industry.[25] A lack of complaints regarding LEC interconnections with CMRS providers suggests that current federal policies as implemented by the states are resulting in interconnection at rates which do not impede market entry.[26] *The success of current policies is a significant indicator that more pervasive federal involvement in LEC-CMRS interconnection rate policies than presently exists is not necessary to effectuate federal goals.* The "strong federal policy underlying Section 332 favoring a nationwide wireless network," NPRM ¶ 111, which the Commission seeks to insure, simply is not impeded by the current policies.

It is also important to consider whether LEC-CMRS interconnection rates can reasonably be deemed to bear on the entry of new CMRS providers. A paper written by Strategic Policy Research and filed by the United States Telephone Association on March 4, 1996 in this docket shows that the average LEC-CMRS interconnection rate per minute is only $0.03. That equates to only 8% of the average rate charged by CMRS providers to their

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[25] See NYNEX Comments at 11-13 (cellular subscriber growth approached or exceeded 50% annually since inception in 1983, and 1994 service revenues exceeded $14 billion, citing Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report, at ¶ 13 (released Aug. 18, 1995); and over $7 billion has been invested in acquiring new PCS spectrum in "A" and "B" Block auctions citing FCC Press Release: "FCC Hits $15 Billion Mark In Total Net Auction Revenues," (dated February 6, 1996)); see Edmund L. Andrews, In Auctions of Airwaves, The Sky Seems To Be the Limit, N.Y. Times, February 2, 1996 at D1 (current "entrepreneurs" auction of PCS spectrum, the "C" Block, has raised nearly $7 billion already and totals are rising; major corporations are providing funds to the entrepreneurs).

[26] The NPRM does not identify a history of complaints against LECs. Moreover, there are no complaints by CMRS providers pending against the NYNEX Companies in their state jurisdictions. Indeed, the record shows satisfaction with current policies from a broad segment of the affected parties. NPRM ¶ 83. The primary trade association for the CMRS industry, Cellular Telecommunications Industry Association, has expressed satisfaction with the current polices which "generally produce fair and non-discriminatory interconnection arrangements." Comments of Cellular Telecommunications Industry Association, Docket No. 94-54, at 20 (September 12, 1994).

subscribers of approximately $0.38.[27] Thus, even if LEC-CMRS interconnection rates were converted to a bill-and-keep system and the full savings to CMRS providers passed through to their subscribers, CMRS subscriber rates would drop by only a fraction. There is simply no record evidence that this slight decrease in CMRS provider costs or CMRS subscriber rates (even assuming the cost reduction was passed through to subscribers) would be sufficient to attract new entrants that would otherwise be barred from entry or to increase growth of the CMRS industry.[28]

The record neither shows that (1) barriers to entry of CMRS providers exist, nor (2) to the extent any such barriers do exist, that interconnection rates with LECs constitute such a barrier or otherwise impose artificial barriers to entry. The FCC's current policy has successfully assured that CMRS providers have access to LEC networks on reasonable terms, as proven by the explosive growth of the CMRS industry in the last 13 years. In short, no one has demonstrated that preemption of state regulation is necessary to accomplish the policy of fostering CMRS development.[29]

Finally, to the extent that the NPRM was motivated by complaints that states were not providing mutual compensation, the 1996 Act moots this concern. It specifically requires

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[27] Comments of The United States Telephone Association at IV, and Attachment A, Rohlfs, Shooshan and Monson, "Bill-and-Keep: A Bad Solution to a Non-Problem," Strategic Policy Research, at 2.

[28] Comments of the United States Telephone Association at 13; see also Comments of Bell Atlantic at 11 (reduction in interconnection costs will not make CMRS providers' rates competitive with LEC rates, even if the full cost reduction is reflected in CMRS rates).

[29] If the Commission were to change its current policy, it would be required to set forth with particularity the reasons for the shift, including an explanation of why the rationale for the existing policy is "'no longer dispositive.'" New York Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502, 508 (2d Cir. 1985), cert. denied, 474 U.S. 846 (1985); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), appeal after remand, State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert. denied sub nom., New York v. Dole, 480 U.S. 951 (1987) (commission is required to provide a "satisfactory explanation" that clearly articulates the grounds for its departure from its prior policies); Gulf Power Co. v. Federal Energy Regulatory Comm'n, 983 F.2d 1095, 1101 (D.C. Cir. 1993) (holding agency erred by imposing a disproportionately harsh sanction in departure from previous policy, without adequate explanation, and in failing to consider "possible alternative sanctions"). Given the demonstrated success of the CMRS industry and the lack of evidence that CMRS providers are being denied access under reasonable terms, the factual predicate necessary to justify a change in policy is lacking. Indeed, the Commission is well advised to maintain its current and evidently very successful policy.

states to compel mutual compensation, unless both parties agree to waive mutual compensation. 47 U.S.C. Section 252(d). Federal courts are empowered to enforce this provision. 47 U.S.C. Section 252(e)(6). The most effective means to implement mutual compensation, therefore, is to implement the 1996 Act, not to adopt bill and keep.

**D. PSC of Maryland (3): Whether state regulation would 'negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects.[30/]**

Commentators have argued that where a service in inseverable, preemption is permissible (citing inter alia, Public Util. Comm'n of Texas v. Federal Communications Comm'n, 886 F.2d 1325 (D.C. Cir. 1989), California v. Federal Communications Comm'n, 1996 U.S.App. LEXIS 1234 (Jan. 31, 1996) and Illinois Bell Telephone Co. v. Federal Communications Comm'n, 883 F.2d 104 (D.C. Cir. 1989)).[31/] It is true that in cases in which federal regulation has not entirely displaced state regulation, state law may be preempted if it actually conflicts with federal law, such as when compliance with both federal and state regulation is a physical impossibility or state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983) (even though state action might bar or slow nuclear plant construction and frustrate the federal goal of developing the commercial use of nuclear power, state action was not preempted where there was no direct conflict between state regulation of utility's nuclear plant construction based on economic concerns, a traditional area of state regulation, and accomplishment of the federal goal); see Louisiana PSC, 476 U.S. at 375 (despite pleas that state depreciation practices that deviated from the federal practice would adversely affect interstate service, the Court determined that state regulation in that circumstance could not be deemed to be an obstacle to the accomplishment of federal goals). In the area of FCC regulation, the question of whether such a conflict exists is distilled into the concept of "severability."[32/]

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[30/] This section covers the third and to some extent the second and sixth bases for preemption described in Louisiana PSC.

[31/] See, e.g., Comments of Sprint Spectrum and American Personal Communications at 45-46; Comments of Century Cellunet Inc. at 16; Comments of the Personal Communications Industry Association at 22.

[32/] Preemption of state regulation of LEC-CMRS interconnection rates may disrupt state implementation of state goals that are not at all contrary to the federal goal of assuring entry to CMRS providers. Of particular concern here, current LEC interconnection rates result in revenue streams from CMRS carriers of approximately $800 million to $1.1 billion annually. Comments of The United States Telephone Association, Attachment A at 1. On the NYNEX

(continued...)

The FCC's ability to preempt state jurisdiction is specifically limited to that *necessary* to achievement of its goal and the FCC bears the burden of showing with specificity that state provisions negate the federal policy by, for example, demonstrating that severability is impossible. Courts have found, for example, that state action denying physical interconnection cannot be severed from interstate service because failure to interconnect precludes both interstate and intrastate service. See Public Util. Comm'n of Texas v. Federal Communications Comm'n, 886 F.2d 1325, 1333-1334 (D.C. Cir. 1989) (noting that technological inseparability of interstate and intrastate calls is insufficient to justify preemption "unless that technological inseparability also prevents the FCC from separating its regulation into interstate and intrastate components"; absent a showing of inseparability, FCC must limit its regulation to interstate aspects); PSC of Maryland, 909 F.2d at 1516 (affirming FCC authority to preempt states from setting rates charged by LECs to interexchange carriers for disconnection of subscribers' service, because inter alia, the service *cannot be unbundled*; to disconnect a customer's local service for non-payment of his interexchange bill, an LEC must also disconnect his interstate service); NARUC v. FCC II, 880 F.2d 422, 430 (emphasis added) ("We conclude, therefore, that the Commission may take appropriate measures in pursuit of that goal, *but only to the degree necessary to achieve it . . . .*").

In contrast, rate regulation is typically severable. As recognized in Louisiana PSC, 476 U.S. at 375-76, different ratemaking methodologies can readily be accommodated by separating the costs between intrastate and interstate service and letting each regulatory body set rates within regulatory sphere. Compare People of the State of California v. Federal Communications Comm'n, 4 F.3d 1505 (9th Cir. 1993) (FCC acted in accordance with Louisiana PSC in respecting the dual system of regulation established by Congress by requiring Bell Operating Companies to offer Basic Service Elements ("BSE") technically compatible with interstate service in conjunction with interstate Basic Serving Arrangements ("BSA"), and prohibiting mixing and matching of interstate BSEs and intrastate BSAs, while not preempting the states from setting rates for those BSEs that are used for intrastate services).

Various commentators have argued that CMRS service is inherently interstate because service areas are not based on state boundaries, some transmission towers may provide service across jurisdictional boundaries and calls may be inappropriately labeled where the CMRS user is near a state border or crosses a state border. See, e.g., Comments of Vanguard

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[32/](...continued)
system alone, nearly $50 million in revenues is at stake. These rates cover both the direct and indirect costs of terminating CMRS calls to LEC subscribers, as determined by state regulators. The indirect costs are those common costs which generally benefit all network users, including CMRS providers, such as the cost of achieving universal service, which has value to CMRS subscribers, as well as wireline carriers' subscribers, by expanding the population that can be reached. The states' exercise of authority over intrastate rates pursuant to 47 U.S.C. Section 152(b) is critical to assuring these goals can be met.

Cellular Systems, Inc. at 25; Comments of Sprint Spectrum and American Personal Communications at 47-48; Comments of Personal Communications Industry Associations at 19; Comments of Nextel Communications, Inc. at 15. However, the case for inseverability rests on selected examples, generally involving situations in which CMRS providers may not collect data needed to determine whether a particular mobile call is interstate or intrastate or highly unusual situations, such as cross-border towers. The danger in relying on such isolated examples is that the Commission may lose the regulatory forest for the trees. To the extent there is any current absence of "measurability," it is caused by previous determinations of the Commission that CMRS is "local" in nature, which negated the need for real-time measurement. With the prospect of bill and keep so near at hand, CMRS providers have a great disincentive to gather this data. In any event, implementation of wireless adapted SS-7 protocols will provide substantial call detail in the future.

However, the Commission does not need to require the development of call-specific data; it can resolve severability issues in the same manner that countless important ratemaking determinations are made. As set forth in the NYNEX Comments at 40, there has been no factual showing that traffic studies cannot be used to apportion interconnection traffic by jurisdiction. Such studies are customarily used for ratemaking, such as in setting rates for termination of interexchange traffic. NYNEX Comments, at 40 n.63. Such studies can estimate the degree to which calls are made in interstate commerce and can readily identify the number of calls made through the relatively few cross-border towers and allocate such calls (and the associated cost and revenues) between the interstate and intrastate domains.[33/] For example, in the case of the caller who makes a call from another jurisdiction, CMRS providers could, if they wish, gather call-specific data that would permit the call to be identified as intrastate or interstate. For example, Western Wireless Corporation identifies the portion of its traffic that is interstate versus intrastate. Comments of Western Wireless Corporation at 12. As made clear from its discussion, common facilities are used to transport both interstate and intrastate calls, and the location of the facilities may not correspond to the service rendered; *i.e.*, an intrastate call may be routed over facilities located in another state. Id. But, nevertheless, a determination of the nature of the traffic can be made, and that determination would be the basis for a separations determination. Jettisoning state regulation of intrastate calls originating with CMRS providers and terminating on LEC networks based on these examples would be particularly inappropriate, because, as the Commission itself has found:

> Although we find that we have plenary jurisdiction over the physical interconnections between cellular and landline carriers, *the actual costs*

[33/] This allocation of responsibilities, which gives a preeminent role to State commissions, is consistent with the Commission's previous determination that CMRS-LEC interconnection rates are largely a matter of state, not federal concern. See In re Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408, 5453 (1994).

> *and charges for the physical interconnections [cite omitted] of cellular systems are suited to dual intrastate and interstate regulation.* "Changes applicable" to cellular interconnection are separable. As with telephone plant depreciation costs [at issue in Louisiana PSC], *it is possible to divide the actual interstate and intrastate costs of cellular interconnection. . . .* Although we are not mandating a jurisdictional separations process for the cellular service unless it becomes necessary to do so, we emphasize that our jurisdiction is limited to the actual interstate cost of interconnection and ensuring that interconnection is provided for interstate service. [Cite omitted].[34/]

Although the 1993 Budget Act expanded the Commission's authority as to the rates charged by CMRS providers, the Commission's 1987 analysis as to severability still holds true; rates charged by LECs to CMRS providers for interstate interconnection are severable from rates charged for intrastate interconnection.[35/] Here, as in Louisiana PSC, severability is possible. Thus, the Commission cannot by-pass the question of separability and claim complete control over LEC-CMRS interconnection rates. A regulatory model that includes direct regulation of intrastate rates charged by LECs for LEC-CMRS interconnections (such as suggested in NPRM ¶ 110) must be rejected, as noted above.

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34/ In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379 Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987). Were the Commission to assert the right to regulate rates for all LEC-CMRS interconnection on the theory that CMRS service is not severable, provisions of Section 252, enacted only last month, as they apply to pricing of LEC-CMRS interconnection would be negated. This would do grave harm to Congress' clear intent to delegate to the states the ratemaking responsibility for LEC-CMRS interconnection.

35/ If the Commission were to change its policies so as to strip state regulatory agencies of rate authority and supplant current LEC-CMRS interconnection rates with a "bill-and-keep" policy, state regulators would be confronted with an approximately billion dollar revenue shortfall; that is, the approximately billion dollars in revenues currently paid by CMRS providers would be shifted -- either to local subscribers, or if state regulators do not act to adjust local rates, to LEC shareholders, which could adversely affect the LECs' ability to raise capital. In the interim, CMRS providers -- and their shareholders and/or subscribers -- would enjoy a substantial and unjustifiable subsidy. (Compare 47 U.S.C. Section 254(k) ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition")).

## IV. CONCLUSION

The proponents of Commission preemption of state regulation of intrastate LEC rates charged to CMRS providers have utterly failed to point to any provision of the Communications Act as amended which authorizes Commission regulation of intrastate LEC rates or to any evidence that demonstrates that such regulation is necessary to permit CMRS entry. The Commission's current guidelines which require that interconnection rates meet minimum standards as necessary to assure entry, and which have not been shown to be ineffective, strike an appropriate balance by promoting achievement of the federal goal, without preempting states from acting within the sphere of jurisdiction specifically reserved to them. Such an approach is consistent with the new mandate prescribed by Congress in the 1996 Act which provides states with jurisdiction in the first instance over LEC-CMRS interconnection agreements, including rates. Given the record before the Commission, the most compelling portion of which demonstrates that the CMRS industry is successful by any measure, there is simply no factual or legal predicate that would support a fundamental change in regulatory policy in favor of a new policy premised on federal preemption of state regulation of intrastate rates for interconnection. To the extent that problems with respect to LEC-CMRS interconnection do exist, they can best be addressed in a comprehensive fashion through federal and state implementation of the 1996 Act. Contrary to the claims of CMRS providers, preemption of state jurisdiction over LEC intrastate interconnection rates and imposition of "bill and keep" is neither needed nor lawful.